Arizona Directors Institute:
25 Years of Excellence

Arizona Department of Education

Special Education Law: A Year in Review

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Federal Policy Update

Results Driven Accountability

The United States Department of Education's Office of Special Education Programs (OSEP) is currently revising its accountability system in order to shift the balance from a system focused primarily on compliance to one that puts more emphasis on results.

As stated by OSEP:
OSEP'S vision for Results-Driven Accountability is that all components of accountability will be aligned in a manner that best supports states in improving results for infants, toddlers, children and youth with disabilities, and their families. The IDEA requires that the primary focus of IDEA monitoring be on improving educational results and functional outcomes for children with disabilities, and ensuring that states meet the IDEA program requirements. The current system places heavy emphasis on procedural compliance without consideration of how the requirements impact student learning outcomes. In order to fulfill the *IDEA's* requirements, a more balanced approach to supporting program effectiveness in special education is necessary.

The Department is now requiring states to include a new qualitative indicator, the State Systemic Improvement Plan (SSIP) in the state's State Performance Plan. The SSIP will include a plan based on an analysis of relevant data to focus on improving State selected educational outcomes for students with disabilities.

For 2014, OSEP included a Results Matrix in addition to a Compliance Matrix to focus on both compliance and results data in making its annual determination of whether the state met IDEA requirements or is in need of assistance or intervention. For the Part B determination this year (programs for students with disabilities ages 3-21), in addition to compliance factors, the Department used multiple outcome measures that included students with disabilities' participation in state assessments, proficiency gaps between students with disabilities and all students, as well as performance in reading and math on the National Assessment of Educational Progress (NAEP) to produce a more comprehensive and thorough picture of the performance of children with disabilities in each state.
The OSEP's Results Driven Accountability Home Page can be found at: www2.ed.gov/about/offices/list/osers/osep/rda/index.html

Case Law Update

I. Child Find/Evaluation Issues

A. The United States Department of Education issued a memo to states regarding the special education evaluation requirements under the IDEA for students who are highly mobile. The United States Department of Education issued a memo to states regarding the special education evaluation requirements under the IDEA for students who are highly mobile.

The Department addressed the situation when some highly mobile children change school districts after the previous school district began, but has not yet completed the special education evaluation, and the new school district postpones the evaluation until the new school district's response to intervention (RTI) process has been implemented. The Department has defined RTI to mean:

> A multi-tiered instructional framework, often referred to as RTI, is a schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors. With a multi-tiered instructional framework, schools identify students at-

> risk for poor learning outcomes, monitor student progress, provide evidence-based interventions, and adjust the intensity and nature of those interventions depending on a student's responsiveness.

The Department opined that this practice could unnecessarily delay the initial evaluation of highly mobile children. If a child transfers to a new school district during the same school year before the previous school district has completed the child's evaluation, the new school district may not delay the evaluation or extend the evaluation time frame in order to implement an RTI process. While the new school district may choose to provide interventions while it is in the process of completing the evaluation, it would be inconsistent with the evaluation provisions in 34 CFR Sections 300.301 through 300.311 for a school district to delay completing an initial evaluation because a child has not participated in an RTI process in the new school district. Letter to State Directors of Special Education 61 IDELR 202 (United States Department of Education, Office of Special Education Programs (2013))

B. If a functional behavioral assessment (FBA) is used in the context of positive behavioral supports as a process for understanding problem behaviors within the entire school and to improve overall student behavior in the school, it would not be considered an evaluation requiring parental consent under the IDEA.
If the FBA is focused on an individual child's needs, it would be deemed an evaluation requiring that all evaluation procedures (prior written notice, parental consent, etc.) and procedural safeguards be followed. Letter to Anonymous, 59 IDELR 14 (United States Department of Education, Office of Special Education Programs (2012)). Consent must be obtained before conducting a behavioral observation as part of an FBA but not before reviewing existing data. Letter to Gallo 61 IDELR 173 (United States Department of Education, Office of Special Education Programs (2013)).

C. The Court held that the school district did not violate the IDEA when a functional behavioral assessment (FBA) was conducted without parent consent since it was not considered an evaluation under the IDEA. The school psychologist merely reviewed existing data to determine if additional assessments were necessary.
FBAs which are administered for the limited purpose of adapting teaching strategies to a child's behavior, as opposed to determining eligibility or changes in placement, fall outside of the evaluation

requirements of the IDEA.
The targeted purpose of the FBA was not to influence the student's placement, but to guide interactions between instructors and the student in the course of teaching the curriculum. Therefore, in this case, the FBA was akin to a "screening . . . to determine appropriate instruction strategies for curriculum implementation," which is not the same as an evaluation. West-Linn Wilsonville School District v. Student 114 LRP 33597 United States District Court, Oregon (2014))

D. The parents obtained an Independent Educational Evaluation and sought reimbursement. On an appeal from the hearing officer, the Court addressed the costs to be reimbursed.
The parents claimed that they were entitled to be reimbursed for the independent evaluator's "protocol review, testimony, hotel, and airfare in connection with [the school district's] 504. This cryptic notation likely refers to services rendered in proceedings under Section 504 of the Rehabilitation Act. Yet Parents do not explain how expenses from the Section 504 proceedings relate to the cost of the IEE required under the IDEA. Accordingly, the Court finds these costs do not constitute appropriate relief."
However, the Court did award reimbursement for the time the independent evaluator spent on a teleconference with the eligibility team. The Court stated that the: ".... Parents' right to an IEE, let alone their right to participate in decisions on the educational placement……would mean little if they were left to challenge the District's experts with a partial assessment or 'without an expert with the firepower to match the opposition.' [citation omitted]. Therefore, Parents are entitled to reimbursement for time [the independent evaluator] spent explaining her IEE to the eligibility team." Meridian Joint School District, No.2 v. D.A. 62 IDELR 144 (United States District Court, Idaho (2013)).

II. Eligibility Issues

A. The parent of a student who is African American sued the school district under the IDEA, Section 504 and the ADA for allegedly mislabeling her student as being eligible for special education for 6 years. The parents sought compensatory services and monetary damages. After the parent obtained an IEE, the Team met to consider the IEE and exited the student from special education.
The Court dismissed the IDEA claim holding that the term "child with a disability" under the IDEA does not include students who are

mistakenly identified as disabled. Therefore, there is no cause of action for such student. The IDEA's Congressional findings of addressing disproportionality of children from minority groups does not override the plain meaning of the statute.
The Section 504 and ADA claims were also dismissed since the Court held that intentional discrimination must be shown to support an award of compensatory damages. In this case, the parent consented to the provision of special education services. In addition, the Court stated that intentional discrimination cannot be based on errors in the eligibility determination absent evidence to show that the school had knowledge that their assessments were wrong. S.H. v. Lower Merion School District 729 F.3d 248, 61 IDELR 271 (United States Court of Appeals, 3rd Circuit (2013)).

B. A student with autism was found ineligible for special education based on the Team's conclusion that there was no adverse affect on the student's educational performance. The Team based its decision on the school's evaluation and two independent educational evaluations.
The Court affirmed the Team's decision that the student was ineligible since there was no adverse affect on educational performance putting the student in need of special education. The 268 page eligibility report, based on numerous assessments and observations, considered both the academic and non-academic aspects of the student's education. The Court found that the Team properly considered the student's overall academic success in high school and the fact that none of the school's assessments found that the student's behaviors impeded his participation in the general curriculum. D.A. v. Meridian Joint School District No.2 62 IDELR 205 (United States District Court, Idaho (2014)).

C. A high school student began experiencing intense depression, was diagnosed with anorexia and attempted to commit suicide. The school provided the student with home education since she had difficulty going to school due to her depression, anxiety and fear. The student did well academically and received good grades both before and during the course of home instruction.
Her parents then enrolled her in a private boarding school in another state for teenage girls with histories of eating disorders, substance abuse or behavioral issues. She maintained good grades and her emotional problems improved.
The parents then asked the public school district of residence to identify their student eligible for special education. The Team

determined the student was not eligible for special education since she performed well academically and her emotional problems were not impacting her education. The parents challenged the eligibility decision by requesting a due process hearing.
The Court, in reversing the state review officer (SRO), concluded that the student was eligible for special education. The Court stated that the SRO's decision amounted to a finding that a student with good grades cannot be found IEP eligible which is not supported by the law. In this case, the student's educational performance was impacted by her emotional/psychiatric problems based on her inability to attend school.
The Court ultimately ordered reimbursement for her private placement. The student was denied a FAPE since the school never found her eligible or developed an IEP for her. In addition, the private school was appropriate since the student's educational needs were met. M.M. v. New York City Department of Education 63 IDELR 156 (United States District Court, Southern District, New York (2014)).

III. IEP/FAPE

A. The U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, IDELR 553:656 (1982)) held that an inquiry in determining whether a FAPE is provided is twofold:

1. Have the procedures set forth in the IDEA been adequately complied with?

2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

B. Procedural Issues

1. The parents challenged the IEP Team's decision to change their student's placement to a more restrictive setting. The parents argued that the IEP change was not valid because they did not provide consent for the IEP change. They contended that an IEP change must be agreed upon by the entire IEP Team to be validly implemented.
The Court held that although the IDEA requires that parents

be afforded a meaningful opportunity to participate in the IEP process and requires the IEP Team to consider parental suggestions, the school is not required to obtain the parents' consent to implement an IEP change. The proper recourse for parents who disagree with the contents of their child's IEP is to request a due process hearing.

The Court also rejected the parent's argument that the school district is required to initiate a due process hearing and prevail at the hearing in order to amend an IEP if the parents do not consent. The Court observed that "the regulations are also silent on this issue. In light of the IDEA's lengthy and excruciatingly detailed procedural protections, we decline to read into the statute a significant procedural requirement that Congress did not express."

The Court also addressed the issue of when prior written notice under the IDEA needs to be provided. The Court stated that:

> In order for the parents to effectively participate in and contribute to the process of developing an appropriate IEP for their child, they need to know what the school proposes to do and why, and what has been going on with the child at school. Therefore, before a team meeting at which the school district proposes to adopt or amend an individualized education program, the school district must provide the parents with: (1) prior written notice that explains what the school district proposes to do and why, the factors that are relevant to the proposal, a description of the evaluative methods and results the school district used as a basis for the proposed action, and a description of other options that were considered and the reasons why they were rejected; (2) an opportunity to review all records pertaining to their child; and (3) a full explanation of their rights, including their rights to participate, object, and appeal. (emphasis added)

K.A. v. Fulton County School District 741 F.3d

1195, 62 IDELR 161 (United States Court of Appeals, 11th Circuit (2013).
The Court's holding is in contradiction to the longstanding interpretation of the United States Department of Education that " Providing prior written notice in advance of meetings could suggest, in some circumstances, that the public agency's proposal was improperly arrived at before the meeting and without parent input. Therefore, we are not changing Section 300.503 to require the prior written notice to be provided prior to an IEP Team meeting." (emphasis added) (Comments to the IDEA Regulations in the Federal Register, Vol. 71, No. 156, August 14, 2006, page 46691) See also Letter to Chandler 59 IDELR 110 (United States Department of Education, Office of Special Education Programs (2012)). Note: It is important to check your state's legal requirements since some states require parental consent before making a placement or service change in an IEP.

2. The parents of a student with autism challenged two IEPs for their student. The Court of Appeals affirmed the hearing officer's decision that both IEPs provided the student a FAPE.
The parents challenged the first IEP on procedural grounds alleging that neither the IEP nor the prior written notice (PWN) were sufficiently specific impacting the parent's ability to meaningfully participate. The PWN stated that the student would be placed in the "public high school in his community school".
The Court affirmed the lower court's conclusion that the hearing officer properly found that the prior written notice provided to the parent was sufficient to put the parent on notice of which school was being proposed. The Court stated even if the notice did not make a sufficiently specific formal placement offer, it did not significantly restrict the parent's ability to participate in the development of the IEP.
The parents challenged the second IEP alleging that the IEP developed placing the student in a public high school program could not be implemented due to staffing shortages. The Court concluded the evidence supported the hearing officer's conclusion that the IEP could be implemented as written. The testimony included the fact that there was a contract for private service providers to be backup service providers in the event of a shortage of public school staff. Therefore, the IEP

offered the student a FAPE. Marcus I. v. Hawaii Department of Education 114 LRP 32495 (United States Court of Appeals, 9th Circuit (2014)). Note: This is an unpublished decision.

3. The United States Department of Education has issued a memo regarding the provision of extended school year services (ESY) to children who transfer to a new school district during the summer. The new school district must provide those children with comparable ESY services. The new school district's obligation to provide comparable services is not limited to those services that the child would receive during the normal school year. The Department interprets "comparable services" to mean "services that are similar or equivalent to those services that were described in the child's IEP from the previous school district, whether in the same State or in another State, as determined by the child's newly-designated IEP Team in the new school district." The new school district generally must provide ESY services as comparable services to a transfer student whose IEP from the previous school district contains those services, and may not refuse to provide ESY services to that child merely because the services would be provided during the summer. While the determination of comparable services is made on an individual basis, the new school district's IEP Team may not arbitrarily decrease the level of services to be provided to the child as comparable services. Letter to State Directors of Special Education 61 IDELR 202 (United States Department of Education, Office of Special Education Programs (2013))

4. The parents challenged the appropriateness of their student's IEP with their primary contention that because the school did not accept the diagnosis of autism and instead classified plaintiff as emotionally disturbed, the IEP was not appropriately individualized and therefore the student was denied a FAPE.
The Court observed that while certainly an autistic child may generally have different needs than a child with an emotional disability, the evidence showed that the Team studied and focused on the individual needs of this particular child, and attempted to develop a program that suited this child's needs. The fact that the parents believed he was mislabeled does not

automatically mean that he was denied a FAPE. Thus, the Court looked not to whether the student was properly labeled but whether the IEP itself was sufficiently individualized to meet his unique needs and provide him with educational benefits.
The Court concluded that the IEP offered the student a FAPE based on the evidence which showed that proper evaluations were conducted, the Team considered those evaluations plus input from the parents and the private evaluations they obtained, and developed a program specifically individualized to address the student's unique needs. The IDEA provides no specific right for a student to be classified under a particular disability, but requires that the student's educational program be designed to suit the student's demonstrated needs. R.C. v. Keller Independent School District 718 F.Supp. 2d 113, 61 IDELR 221 (United States District Court, Northern District, Texas (2013)).

5. A student who was parentally placed in a private school by his parents was found eligible for special education by the school district. The Court held that the school violated the IDEA by not offering the student a FAPE through the development of an IEP. It rejected the school's argument that an IEP need not be developed until the student enrolls in the public school. The Court stated that under the IDEA a school has a continuing responsibility to offer a FAPE to a student with disabilities who resides within the school district regardless of whether the student is currently enrolled in a private school.
The parents then can either accept the offer of FAPE in the IEP by enrolling their student in the resident school or refuse the FAPE offer by keeping their student in the private school. (Note: If the student remains in the parentally placed private school, the student would be considered for a service plan under the IDEA.) District of Columbia v. Wolfire 62 IDELR 198 (United States District Court, District of Columbia (2014)).

C. Substantive Issues

1. The parents of a 17 year old student with a specific learning disability challenged his IEPs which addressed three areas in which the student was struggling: Reading, Personal

Management, and Math. The Court concluded, based on expert testimony, that the IEPs' reading goals were inappropriate given the student's present reading levels. The goals were unrealistic given that the student's achievement testing placed him at the elementary school level, the goal of 2010-2011 reading eighth grade materials with a 70% accuracy rate and his 2011-2012 goal of reading ninth grade materials with a 70% accuracy were not attainable as a practical matter.

The IDEA requires IEPs that include a reasonably accurate assessment of students and meaningful goals. In this case, the reading area of the IEPs did not include meaningful goals for the student. To set a goal that he jump six reading levels in one year is unrealistic and unreasonable. The school district objected to the characterization of the IEP goal as requiring the student to read at the eighth grade level. It insisted that the goal was "to comprehend eighth grade materials using appropriate strategies." The Court found "such parsing to be disingenuous: comprehending eighth grade reading materials is comprehending eighth grade reading materials. One has to be able to read before one can comprehend."

The evidence indicated that the IEP for reading was not designed for this student it was the "9th grade goal" regardless of whether it fit his particular needs. The teachers' testified that "they just inserted the standard 9th grade goal". The Court found that such a practice flies in the face of the purpose and goals of the IDEA, which require the district to develop an individualized program with measurable goals. The point of requiring an IEP is to have the program meet the child's unique needs, not to assume that all children in special education are capable of meeting state goals for that grade.

In addition, the Court found that the transition services were inappropriate. The IDEA requires IEPs to include "appropriate measurable post-secondary goals based on an age appropriate transition assessment" and to describe the transition services to be provided. In this case, the IEP did not. The student turned 16 during the 2011 year, and the failure of the 2011-2012 IEP to include required individualized transition goals, transition assessments, and transition services means that the IEP did not comply with the IDEA. Therefore, FAPE was denied. Jefferson County Board of Education v. Lolita S. 62 IDELR 2 (United States District

Court, Northern District, Alabama (2013)).

2. The parents of a 12 year old student with autism initiated a due process hearing challenging two IEPs developed for their student and sought reimbursement for their unilateral private school placement. The hearing officer concluded that the first IEP denied the student a FAPE and ordered reimbursement until the second IEP had been developed approximately 6 months later since the second IEP offered the student a FAPE. The only issue on appeal to the Court was the appropriateness of the second IEP.
The Court concluded that the IEP in dispute offered the student a FAPE. Among the issues raised was the lack of a one-to-one paraprofessional. Although the teacher testified that it would have been "helpful" for the student to have a paraprofessional, the Court stated that "being "helpful" is not the same as being necessary for provision of a FAPE".
Lainey C. v. State of Hawaii, Department of Education 61 IDELR 77 (United States District Court, Hawaii (2013)).

3. The parent of a student initiated a due process hearing alleging that both the student's former school district and present school district failed to provide their student a FAPE based on several grounds including an allegation that the IEP did not offer services that allowed the student to make progress in reading. The Administrative Law Judge concluded that the IEP afforded the student a FAPE.
The parent contended that the school district should have implemented a program that included 2.5 to 3.0 hours per day of intensive intervention reading program, pursuant to the State Department of Education's guidelines for students that are more than two years behind in reading. (citing the Reading/Language Arts Framework for California Public Schools) The applicable framework states that "[e]ducators will use this framework and the content standards as a roadmap for curriculum and instruction." The Court notes that the "guidelines" that the parent contended were not followed are merely guidelines and not a mandatory requirement of the IDEA. However, the evidence reflected that the IEP did in fact comport to these guidelines.
Finally, the parent alleged that the student failed to progress and that the school's knowledge of the lack of progress required the school to convene an IEP meeting to discuss the

IEP. Specifically, the parent contended that the student remained at least two years below grade level in his reading skills and made little or no progress although the parent did not contest that the student made five months' growth in five months' time in one area of reading—decoding skills. The Court held that "Test scores are only one metric by which to assess progress. Another metric, one with particular significance in the IEP process, is a student's progress on goals. IEP meeting notes, the IEPs, and teacher testimony established that Student continued to make progress on his reading goals." Based on staff testimony and other evidence, the Court concluded that the student's progress was largely attributable to the reading interventions and accommodations provided the student throughout his time in the present school district. D.A. v. Fairfield-Suisun Unified School District, the Vacaville Unified School District and the California Department of Education 62 IDELR 17 (United States District Court, Eastern District, California (2013)).

4. A student with drug abuse problems and suicidal behaviors was found eligible for IEP services due to her ADHD. After placement in a hospital for a suicide risk assessment and an in-patient substance abuse rehabilitation facility, the parents presented the school with a discharge summary which recommended an alternative school setting and attendance in Alcoholics Anonymous/Narcotic Anonymous meetings.
The parents rejected the IEP developed for the student calling for placement in a special education community school program with full-time emotional support in school. The parent placed the student in a private college preparatory therapeutic boarding school where about half the students have alcohol and substance dependency issues. The parents then filed for due process requesting reimbursement for that placement.
The Court, in affirming the hearing officer, found that the IEP was appropriate and reimbursement was not warranted. The IEP properly identified the student's needs, set goals in multiple areas and provided full-time emotional support services. The staff were specially trained to be aware of and to intervene with drug and alcohol problems and the underlying emotional issues. The program has a school wide behavior plan and individual student behavior support plans. In so concluding, the Court stated that "a school district

cannot be held responsible for treating a student's longstanding drug addiction, familial problems, or delinquent behavior". E.K. v. Warwick School District 62 IDELR 289 (United States District Court, Eastern District, Pennsylvania (2014)).

5. A student with multiple disabilities, who was 20 at the time of the due process hearing, was denied a FAPE based on her IEP's post-secondary transition component. The school did not conduct age appropriate assessments related to her post-secondary goals. In addition, she was not invited to participate at the IEP Team meetings where her post-secondary transition needs were discussed and the school never engaged in other steps to ensure her preferences and interests were considered. The Court concluded these deficiencies resulted in substantive harm to the student denying her a FAPE. Gibson v. Forest Hills School District Board of Education 61 IDELR 97 (United States District Court, Southern District, Ohio (2013)).
In a subsequent case addressing the remedy, the Court rejected the remedies proposed by both the school and the parent. The Court ordered 120 hours of community based employment "discovery services" providing the student extended community based assessments to gauge her interests and determine her level of work skills. In addition, the Court ordered training with a job coach in the community and instruction in employment related skills. These services were ordered to be supervised by a "customized employment consultant". Gibson v. Forest Hills School District Board of Education 62 IDELR 261 (United States District Court, Southern District, Ohio (2014)

6. The Court held that the student's IEP did not provide the student with a FAPE since it did not properly address the student's visual impairment. Although the school had a report that the student was visually impaired, the report was "buried in some files" and not used in preparing the student's IEP. The evidence showed that the student's classroom teachers were oblivious to the nature of his visual impairment.
The evaluation conducted by the vision teacher focused primarily on evaluating the impact of the student's impairment on his mobility and did not address the impact on his learning. The fact that the student's teachers exhibited no

understanding of the impact of the student's disability is a "damning failure" on the part of the school district leading to an inappropriate IEP. Caldwell Independent School District v. Joe P. 62 IDELR 192 (United States Court of Appeals, 5th Circuit (2014). Note: This is an unpublished decision.

IV. Related Services/Assistive Technology

A. The United States Supreme Court Decision – Irving Independent School District v. Tatro, 104 S. Ct. 3371, IDELR 555:511 (1984).

1. The United States Supreme Court established a three-prong test for determining whether a particular service is considered a related service under the IDEA. To be entitled to a related service:

a) A child must have a disability so as to require special education under the IDEA;

b) The service must be necessary to aid a child with a disability to benefit from special education; and

c) The service must be able to be performed by a non-physician.

B. Two students with hearing impairments requested the school to provide them with Communication Access Realtime Translation ("CART") in the classroom. CART is a word-for-word transcription service, similar to court reporting, in which a trained stenographer provides real-time captioning that appears on a computer monitor. In both cases, the school district denied the request for CART but offered other accommodations. The parents pursued due process hearings and in each case the hearing officer found that the IEPs provided the students with a FAPE under the IDEA.

On appeal to the district court both students claimed that the denial of CART violated both the IDEA and Title II of the ADA. In each case, the district court granted summary judgment for the school district, holding that the district had fully complied with the IDEA and that the plaintiff's ADA claim was therefore foreclosed by the failure of her IDEA claim.

The Court of Appeals held that a school district's compliance with its obligations to a deaf or hard-of-hearing student under the IDEA does not necessarily establish compliance with its "effective

communication" obligations to that student under Title II of the ADA. The Title II effective communications regulation states two requirements: First, public entities must "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." 28 CFR 35.160(a). Second, public entities must "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." 28 CFR 35.160(b)(1). The Title II regulations define the phrase "auxiliary aids and services" as including "real-time computer-aided transcription services" and "videotext displays." 28 CFR 35.104. "In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities." 28 CFR 35.160(b)(2).
The Court remanded the cases back to the District Court for further proceedings. K. M. v. Tustin Unified School District 725 F.3d 1088, 61 IDELR 182 (United States Court of Appeals, 9th Circuit (2013)) Petition for appeal to the United States Supreme Court denied (2014).

C. The parents of a 10 year old student with Downs Syndrome challenged the IEP Team's decision to place the student on the special education bus. The IEP team determined that the student's inappropriate behaviors at school prevented him from being able to ride the regular education bus. The parents initiated a due process hearing.
The Administrative Law Judge issued a twenty-three page decision and order finding that the school district failed to provide the least restrictive transportation environment, but that the parents had failed to prove that their student was denied FAPE.
The Court held that the evidence supported the conclusion that the student would be able to ride the regular education bus with a "bus buddy" . The student's father testified that the student did not have significant behavioral problems in the family car. In addition, the parents' witnesses (a bus aide with 22 years of experience and a Professor of Special Education) testified that the student was capable of riding the regular education bus with a peer-aged, non-disabled "bus buddy. The Court found that the lack of a regular education teacher on the Team did have an impact on the decision-making process and resulted in an educational loss for the student. B.B. v. Catahoula Parish School District 62 IDELR 50 (United States

District Court, Western District, Louisiana (2013)).

D. The parents of an 8 year old student with autism rejected the IEP developed for their student which called for services to be provided in the "total school environment" and made a unilateral placement at a private special education school. They sought reimbursement by requesting a due process hearing.
The Court held that the provision of speech services through an "embedded model" (direct speech therapy provided in the classroom with peers present) was appropriate. In addition, although a graduate clinician provided some of the services and authored the progress notes, the clinician was being supervised by a speech language pathologist and therefore her role of clinician did not impact the appropriateness of the services. Although the student may have made more progress through one-on-one therapy, the evidence supported the conclusion that the student made significant progress through the embedded model of services. E.L. v. Chapel Hill-Carrboro Board of Education 62 IDELR 4 (United States District Court, Middle District, North Carolina (2013))

V. Placement/Least Restrictive Environment

A. The Court concluded that the IEP for a 12 year old student with specific learning disabilities failed to provide the student a FAPE in the least restrictive environment. The IEP called for the student to spend five out of six and half hours each day in the regular classroom.
The IDEA requires the IEP to explain the extent, if any, that the student will not be educated in an environment with peers who are non-disabled after the team has considered the student's needs and the provision of supplementary aids and services. This student's IEP stated that a "regular classroom environment with supplementary aids and services….would not meet [the student's] need for specially designed instruction at this time".
The Court affirmed the hearing officer's finding that this vague statement regarding placement did not include the reasons for the student's exclusion from the regular education classroom. Since the Court found the school failed to meet the IDEA standard to identify reasons why the student would be excluded part-time from the regular classroom environment, FAPE was denied. Hannah L. v. Downington Area School District 114 LRP 32790 (United States District Court, Eastern District, Pennsylvania (2014))

B. The IEP placement for a student with autism was changed from a general education class on a shortened schedule to a special education class with some opportunity to interact with peers who are non-disabled during the non-academic portion of the day.

The Court, in affirming the Administrative Law Judge, held that the IEP was inappropriate both procedurally and substantively. The Court held that the broad offer of a special education class without including the specific classroom location violated both the IDEA and state law "as a matter of law". The failure to include a specific class placement "significantly restricted" the parents participation in the IEP process since it did not provide them with sufficient information to determine whether the IEP was appropriate.
In addition, the Court in applying the standards established by the Holland case (the educational benefits from inclusion in a general education class, the non-academic benefits and student's effect on the general education classroom), concluded that the least restrictive environment for the student was placement in a general education class in the student's home school. Bookout v. Bellflower Unified School District 63 IDELR 4 (United States District Court, Central District, California (2014)).

C. A class action was initiated by parents of students with autism who alleged that the School District transfers students with autism in kindergarten through eighth grade without providing the level of parental notice and involvement required under state and federal law.
If a student is identified as being a student with autism who requires access to an autistic support classroom, the student is placed into one of three autistic support classrooms based on "grade level": kindergarten through second grade ("K-2"), third grade through fifth grade ("3-5"), and sixth grade through eighth grade ("6-8"). Although there are three different groups, a school sometimes offers only one grade level of autistic support. When a student requiring autism support completes the highest grade level provided in his or her current school, the school district transfers that student to a different school where those services can continue to be provided. The building assignment decision is not made by a student's IEP team and parents are generally not involved in the process. This process is referred to as an "upper-level transfer".
The school district conceded that it provides parents with no written notice prior to the building assignment decision. Rather, the school district generally does not advise parents that their child will be

transferred until after the decision concerning the transfer has been made. The first notification to the student's parents about their child's transfer comes from the student's school, and is usually issued in late spring.

The Court noted that IDEA requires that the school district provide for meaningful parental participation and prior written notice whenever it initiates or proposes to change the "educational placement" of a child and that neither the text nor legislative history of the IDEA defines the term "educational placement."

The Court found that an unplanned transition for children with autism, as opposed to other students with disabilities such as a student with a specific learning disability, is likely to affect their learning rate and learning sequences. This is because difficulty with transition is one of the defining characteristics of children with autism. Thus, despite the school district's contention to the contrary, upper-leveling students with autism does not merely change their physical surroundings; the transition is likely to have a significant impact on their learning experience. The Court concluded that under the particular facts of this case, upper-leveling students with autism to a separate school building in the school district constitutes a change in their "educational placement" under the IDEA. As a result, the school district's process of upper-leveling children with autism violated the procedural safeguards under the IDEA, and "seriously deprives" parents the opportunity to participate in the decision-making process regarding the educational placement of their autistic child. The school district was ordered to alter its upper-leveling process for children with autism to provide prior written notice and a level of parental participation that complies with the procedural requirements under the IDEA. The Court did note “by no means does our holding suggest that parents of children with autism are entitled to any type of "veto power" over the final location decision. We simply conclude that under the IDEA, the school district cannot categorically deny parents the opportunity to provide input and receive notice about the educational placement of their autistic child.” P.V. v School District of Philadelphia 60 IDELR 185 (United States District Court, Eastern District, Pennsylvania (2013)) The Court approved a settlement agreement in 2014 ending the class action lawsuit. Under the agreement, the School District must now formally alert parents of children with autism in January of each year that their child may be transferred to a new school, listing the proposed school, if known, and informing parents of their rights to participate in an IEP Team meeting with school officials to discuss the transition. Teachers and school officials will also receive formal

acknowledgement of transfers. By June 1 of each year, the district must provide an official letter of transfer and inform parents of their rights to challenge the circumstances of their own transfer through an administrative due process hearing. The district also must publish a listing of Autism Support classrooms on its website by mid-October of each year so that if parents wish to try to have their children in such a classroom, they know where these services exist.

D. The parents of a student with autism, an intellectual disability, ADHD and a seizure disorder rejected the IEP developed for their student which would change the placement from full time in home services to a modified plan of in school services in a self-contained class for two hours per day and in home services for three hours per day. The parents felt that in home instruction was necessary to prevent the student from becoming ill or developing stress and would also afford them the opportunity to non-prescription nutritional supplements every 45 minutes.
The Court upheld the IEP stating that the LRE provisions of the IDEA favors reintegrating students into the school setting where they can socially interact with other students. The evidence showed that the strict diet and nutritional supplements were not prescribed by a physician and that the student did not have a life threatening condition justifying home instruction. A.K. v. Gwinnett County School District 62 IDELR 253 (United States Court of Appeals, 11th Circuit (2014)). Note: This is an unpublished decision. Petition for appeal to the United States Supreme Court pending.

E. The Court held that the least restrictive environment provisions of the IDEA apply to extended school year placements just as it does to school year placements. Therefore, the IEP Team in determining the extended school year program for the student was required to consider a continuum of alternative placements for the student. The Court overturned the District Court's decision that the school met its obligations to the student with autism by developing an extended school year IEP in a self-contained special education classroom. T.M. v. Cornwall Central School District 63 IDELR 31 (United States Court of Appeals, 2nd Circuit (2014)).

F. The Court, in affirming the Administrative Law Judge's decision, concluded that the school district did not predetermine the student's IEP placement before the IEP Team meeting was held.
The District Placement Review Committee (DPRC) met and discussed the student's placement options before the IEP Team

meeting. The school psychologist, the lead psychologist, the special education coordinator, and the former special education director met and discussed the school district's various self-contained special education programs in terms of availability and to determine which of the programs could be appropriate for student. The parent wanted the student to attend a private placement.

The IEP Team reconvened and met for two hours. During this meeting, the IEP Team discussed and considered the experts' reports, the recommendations in those reports, reading programs, the various special education environments available within the school district's schools, and the private placement requested by the parents. At the end of the meeting, the special education coordinator indicated that the offer of placement would be in a school district program. A prior written notice was then provided the parents.

The Court found that the DPRC had not finalized the placement but had recommended a proposed placement to be discussed at the IEP Team meeting. While parents must be given an opportunity to participate in meetings with respect to the formulation of a student's IEP, the IDEA allows school personnel to engage in preparatory activities to develop a proposal or a response to a parent proposal that will be discussed at a later IEP team meeting. S.P. v. Scottsdale Unified School District No. 48 62 IDELR 86 (United States District Court, Arizona (2013))

VI. Unilateral Placements

A. The United States Supreme Court in Burlington, MA v. Department of Education et al., 105 S. Ct. 1996, IDELR 556:389 (United States Supreme Court (1985), held that parents may be awarded reimbursement of costs associated with a unilateral placement if it is found that:

1. The school district's IEP is not appropriate;

2. The parent's placement is appropriate; and

3. Equitable factors may be taken into consideration

B. Parental placement at a school which is not state approved or does not meet the standards of the state does not itself bar public reimbursement under the Burlington standard if the placement is

"proper". Florence County School District Four et al. v. Carter, 114 S. Ct. 361, 20 IDELR 532 (United States Supreme Court (1993)).

C. A parent's request for reimbursement for a unilateral placement was denied by the District Court based on a finding that the private school placement was not appropriate for their student who had emotional and behavioral disabilities. The sole issue on appeal in this case was whether, under the second prong of the Burlington standard, the student's placement at the private school was appropriate.

The Court noted that the parents "bear the burden of establishing the appropriateness of their private placement." The appropriateness of a private placement turns on whether it "is reasonably calculated to enable the child to receive educational benefits." In making this determination, it is necessary to look at the "totality of the circumstances" and "[n]o one factor is necessarily dispositive." A "unilateral private placement is only appropriate if it provides education instruction specifically designed to meet the unique needs of a handicapped child."

In affirming the decision, the Court observed that while both the hearing record and the additional evidence heard by the District Court showed that the student made some academic and behavioral progress while at the private school, "such progress does not itself demonstrate that a private placement was appropriate." The Court adopted the findings of the state review officer who found the private school to be an inappropriate placement because the school failed to develop an individualized academic program; because it failed to provide specific support to address the student's difficulties with organizational skills, executive functioning, and fine motor skills; and because its behavioral program, which involved sanctions and time-outs, was inappropriate. M.B. v. Minisink Valley Central School District 523 F.Appx. 76, 61 IDELR 5 (United States Court of Appeals, 2nd Circuit (2013)). Note: This is an unpublished decision.

D. The parents of a student with developmental delays initiated a due process hearing seeking reimbursement of their student's private school placement. The hearing officer, in concluding that the disputed IEPs did provide the student a FAPE, denied reimbursement and compensatory education. The Court affirmed the hearing officer's decision that FAPE was afforded and refused to hear new issues raised on appeal that were not raised in the due process hearing complaint.

The Court noted that although there was evidence to show that the student may have progressed at a greater pace at the private school, such evidence was not relevant to whether the student appropriately progressed while in the public school and received meaningful educational benefit. S.C. v. Department of Education, State of Hawaii 61 IDELR 65 (United States District Court, Hawaii (2013)).

E. An 18 year old student with autism, who was attending a private special education school, had an IEP developed which would have placed him in a Workplace Readiness Program in a self-contained classroom in a regular high school. The Court affirmed the hearing officer's conclusion that the IEP did not meet the LRE requirements and therefore denied the student a FAPE. In doing so, the Court found that the IEP Team did not consider placing the student in a general education class even part time. The Court agreed with the hearing officer that the placement language in the IEP that the student "will participate with his non-disabled peers in activities of his own choosing including morning recess, lunch, lunch recess, school assemblies, and other extra-curricular activities of his own choosing and interest" … which "leaves it up to student to determine his level of socialization with non-disabled peers. This is not a specific enough offer to address the student's socialization needs." The hearing officer awarded the parent reimbursement of their student's private school tuition.
On appeal, the school did not challenge the appropriateness of the student's private placement on appeal. However, the Court reduced the amount of reimbursement by 50% based on equitable factors. The Court found that the "parent's conduct was unreasonable and tainted what should be a collaborative IEP process. The evidence demonstrates that, during the IEP process, the parent failed to express relevant concerns with the DOE's IEP, but raised specific issues for the first time during the administrative hearing below. That is, the parent never requested that the student be placed in a general rather than special education setting. Moreover, the parent never raised his later concerns regarding which activities the student would choose to participate in with non-disabled peers. In fact, it appears that the parent's sole concern was that the DOE place the student" in the private school and would disapprove of any other placement. Department of Education, State of Hawaii v. S.C. 61 IDELR 18 (United States District Court, Hawaii (2013)).

F. The parents of a student with autism placed their student in a private school and sought reimbursement. The Court concluded that the IEP

was inappropriate and the private placement was proper resulting in an order for reimbursing the parents.
The Court found that that lack of parent counseling and training (required under state law for parents of students with autism) and a vague behavioral intervention plan (BIP) that was not based on a functional behavioral assessment (FBA) rendered the IEP substantively inadequate. The Court's conclusion was rooted in testimony that the student's behavioral needs required a 1 to 1 teacher/ student ratio in the classroom which the Team failed to consider. The classroom ratio could not be separated from the school's failure to conduct an appropriate FBA or BIP. C.F. v. New York City Department of Education 62 IDELR 281 (United States Court of Appeals, 2nd Circuit (2014)).

G. The parents of a student with autism sought reimbursement for their student's unilateral private school placement. The parents disputed the school's ability to provide the specified speech and occupational therapy services given evidence of previous IEP implementation problems with respect to such services at the school. In response, the school offered testimony from the school's assistant principal stating that no such problem would arise in this student's case because, if necessary, his related services would be arranged through outside providers. The school offered testimony that the school provided related services through district providers or, where needed, by contracting with outside providers. If outside providers were not available, the parents would be provided with vouchers to secure such services from private providers.
The Court upheld the IEP finding that the school's testimony merely explained how the school intended to implement the related services already specified in the IEP and did not constitute "retrospective testimony" that services not listed in the IEP would actually have been provided the student if they attended the public school.
In addition, the Court rejected the parents' contention that their student required a 1 to 1 teacher. The proposed IEP offering a special education class staffed by a teacher for six students along with a 1 to 1 paraprofessional assigned to this student would provide an education allowing meaningful educational progress. Therefore, the request for reimbursement was denied. F.L. v. New York City Department of Education 62 IDELR 191 (United States Court of Appeals, 2nd Circuit (2014). Note: This is an unpublished decision.

H. A student with ADHD and a non-verbal learning disability had been receiving services from the school under a Section 504 plan from

kindergarten through third grade. In third grade the student was evaluated for special education but found not eligible for an IEP. Dissatisfied with the progress their student was making the parents placed the student in a private special education school. The parents then initiated a due process hearing requesting reimbursement for the costs associated with the private school placement.

It was found that the student should have been found eligible for IEP services. By failing to provide an IEP, the school denied the student a FAPE. On appeal, the issue was the appropriateness of the private school. In particular, the question presented to the Court was to what extent must a parents' private school placement take into account the IDEA's least restrictive environment (LRE) provision to educate students with disabilities to the maximum extent with peers who are non-disabled.

The Court held that the restrictiveness of the placement is a factor to be considered in analyzing the appropriateness of the private school placement. However, parents are not subject to the same LRE requirements as a school. In this case, the Court found that the State Review Officer who denied reimbursement, did not properly consider the services and progress that the student received at the private school. The SRO's ruling improperly gave "dispositive weight to the restrictiveness" of the private school finding it inappropriate merely because it was more restrictive than the public school. C.L. v. Scarsdale Union Free School District 744 F.3d 826, 63 IDELR 1 (United States Court of Appeals, 2nd Circuit (2014)).

I. The parent of a student with an intellectual disability removed their student from the public school and made a unilateral placement at a general education parochial school. While at the parochial school the parent hired two private one on one aides to assist the student with her work. The parent filed for a due process hearing which was settled. One provision of the settlement required the school to assess the student and prepare an IEP for the following school year. After what the Court termed "contentious exchanges" between the parties regarding the assessments, the school district informed the parent that the district considered the student to have been voluntarily placed at the parochial school for the following school year. An IEP was never developed.

The parent initiated a second due process hearing requesting reimbursement for their unilateral placement for the following school year. Since there was no IEP in place the Court affirmed the ALJ's conclusion that the school did not offer FAPE in a timely fashion.

The Court further held that the parochial school was appropriate and ordered reimbursement for the parochial school tuition. The parochial school did not provide any special education or related services. The regular education teacher provided instruction under the state's curriculum and both aides followed the curriculum while they worked one on one with the student. A Section 504 plan provided testing accommodations and extra study time. The evidence showed that the student made academic and social gains. The Court observed that although the parochial school placement was "less than perfect" it was not inappropriate for reimbursement purposes under the IDEA.
The Court also ordered reimbursement for transportation expenses to and from the parochial school and partial reimbursement for the one on one aides. S.L. v. Upland Unified School District 63 IDELR 32 (United States Court of Appeals, 9th Circuit (2014))

VII. Behavior and Discipline

A. An 18 year old student with an ADHD, Impulse Control Disorder and an Adjustment Disorder was placed in a 45 day Interim Alternative Educational Setting (IAES) in the home for possession of a three inch long knife and alcohol in school. The Team determined that the student's behaviors were not a manifestation of his disability. The student was then suspended for the remainder of the school year by the Board of Education.

The parents requested an expedited due process hearing challenging the long term suspension. The Administrative Law Judge ordered that the student be allowed to return to high school. The school district appealed the decision. While the appeal was pending the school asked the Court to issue a temporary restraining order prohibiting the student from returning to the high school.
The Court granted the school's Motion. In doing so, the Court noted that the IDEA allows a school to place a student with a disability in a 45 day IAES for weapon offenses. Therefore, the IAES was the current educational placement. Additionally, the Team found no manifestation between the behaviors and disability. The Court stated that these factors supported the conclusion that the school had a substantial likelihood of showing that the stay put provision should not allow the student back into school during the pendency of the proceedings. In addition, the school has a "legitimate interest in, and obligation to provide, safe and productive learning environments". Ocean Township Board of Education v. E.R. 63 IDELR 16 (United

States District Court, New Jersey (2014)).

VIII. Harassment/Bullying Issues

A. The United States Department of Education's Office of Special Education and Rehabilitative Services (OSERS) issued a letter providing an overview of a school district's responsibilities under the IDEA to address bullying of students with disabilities. Although there is no federal law addressing bullying , the Department defines bullying as:

> Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g , cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles.

The Department emphasized that bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA whether or not the bullying is related to the student's disability. The denial of FAPE must be remedied.

The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly. The IDEA placement team (usually the

same as the IEP Team) should exercise caution when considering a change in the placement or the location of services provided to the student with a disability who was the target of the bullying behavior and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement. If the student who engaged in the bullying behavior is a student with a disability, the IEP Team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior. In addition, the IEP Team and other school personnel should consider examining the environment in which the bullying occurred to determine if changes to the environment are warranted. Dear Colleague Letter 61 IDELR 263 (United States Department of Education, Offices of Special Education and Rehabilitative Services Office of Special Education Programs (2013)).

B. In one of the frequently cited judicial cases where bullying was addressed as an IDEA FAPE issue, the Court established the standard to be applied in such an analysis.

In this case, the Court refused to grant the school district's Motion for Summary Judgment regarding the alleged denial of FAPE based on bullying. A student with a specific learning disability alleged that she was bullied in school. The parents met with the principal to discuss their concern about bullying but were told to leave the principal's office. Afterwards, the parents brought up the issue at the IEP meeting but again were told by the principal that it was not an appropriate topic for the IEP Team.

Both the hearing officer and the state review officer concluded that the student's IEP was reasonably calculated to enable the student to receive educational benefits.

The Court found that neither the hearing officer nor state review officer properly considered the relationship of the bullying allegation to the provision of FAPE.

The Court stated:

> The rule to be applied is as follows: When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found

> to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination.
>
> It is not necessary to show that the bullying prevented all opportunity for an appropriate education, but only that it is likely to affect the opportunity of the student for an appropriate education. The bullying need not be a reaction to or related to a particular disability. (emphasis added)

T.K. v. New York City Department of Education 779 F.Supp.2d 289, 56 IDELR 228 (United States District Court, Eastern District, New York (2011)). The case was remanded back to the hearing officer.

On remand, the District Court reversed the hearing officer's and state review officer's decisions and concluded the student was denied a FAPE due to being the victim of bullying.

The Court stated that "a disabled student is deprived of a FAPE when school personnel are deliberately indifferent to or fail to take reasonable steps to prevent bullying that substantially restricts" the educational opportunities of the student with disabilities. The conduct does not need to be outrageous in order to be considered a deprivation of rights of a disabled student. It must, however, be sufficiently severe, persistent, or pervasive that it creates a hostile environment. Where there is a "substantial probability that bullying will severely restrict a disabled student's educational opportunities, as a matter of law an anti-bullying program is required to be included in the IEP".

The Court concluded in this case the fact that the IEP Team refused to take bullying into account when drafting the student's IEP and behavior intervention plan denied a FAPE. When the student's parents sought to raise the bullying problem as it related to her educational needs and opportunities during the IEP Team meeting they were told that it was not an appropriate topic for the meeting. The IEP team's refusal to allow the parents to raise their legitimate

concerns about bullying as it related to her FAPE deprived them of meaningful participation in the development of her IEP.
The Court also reviewed the goals and services in the IEP and BIP and observed that "a lay parent would not have understood them as reasonably calculated to provide a FAPE" in light of the bullying that occurred. The law requires that "the substance of the IEP must be intellectually accessible to parents" so that they could make an informed decision as to its appropriateness.
Lastly, the Court found that the student's learning opportunities were restricted by bullying which was an additional ground for finding that FAPE was denied. The student complained almost daily, withdrew emotionally, started bringing dolls to school for comfort, and was late or absent a for 46 days during the school year because she didn't want to go to school. Although she improved academically, the Court observed that academic growth is not an "all or nothing proposition".
The Court ordered that the parents be reimbursed for their unilateral private placement as a result. T.K. v. New York City 114 LRP 32794 (United States District Court, Eastern District, New York (2014)).

C. The parents of a student with autism who committed suicide sued the school district. Numerous witnesses observed other students mistreating student in the hallways, knocking books out of his hand, telling him to "pick them up, you idiot," and kicking him when he bent down. The parents alleged that the school's failure to intervene, investigate, correct, or train their employees to adequately protect the student from bullying and harassment was the sole or a substantial contributing cause of his decision to take his own life.
The Court dismissed the lawsuit concluding that the school district did not act with deliberate indifference. The evidence showed that the school "diligently investigated" each reported incident and, when they could identify the harasser, disciplined offenders based on the severity of the incident and the accused's disciplinary history. In some cases, the school counselor and the assistant principal held a meeting with the student and the alleged perpetrators to help the students understand the student and his disability. The student's IEP Team also included a safety plan as part of his IEP.
In addition, the Court addressed the allegation that the school failed to implement more effective bullying awareness programs. The parents' experts specifically point to the lack of teacher training, the lack of school-wide assemblies, the ineffective bullying policy, and the failure to provide specific instruction on bullying, disability

harassment, and Asperger's as evidence that the school failed to effectively respond to disability harassment against the student. The Court noted that " Although the evidence clearly demonstrates that [the school] could have implemented more programs to address bullying generally and disability harassment specifically, as discussed below, the evidence shows that [the school] took affirmative steps to address bullying and disability harassment. Under those circumstances, the Court cannot find that Defendants were deliberately indifferent." Long v. Murray County School District 522 F.Appx. 576, 61 IDELR 122 United States Court of Appeals, 11th Circuit (2013)). Note: This is an unpublished decision.

D. The parents of a student with a specific learning disability, a post traumatic stress disorder and a generalized anxiety disorder initiated a due process hearing alleging that their student was denied a FAPE due to bullying and an inappropriate reading program. The Court, in affirming the hearing officer, held that the student was not denied a FAPE as a result of being bullied. In reaching its conclusion, the Court noted that the school took steps to eliminate a culture of harassment and bullying. Although the school could have implemented additional measures, it was not indifferent and appeared willing to take further actions. The IEP team drafted an IEP that "contained significant changes to address the social/emotional needs of the student." The IEP also provided a Behavioral Intervention Plan providing for coping skills, social skills, and self-regulating breaks. N.M. v. Central Bucks School District 62 IDELR 237 (United States District Court, Eastern District, Pennsylvania (2014)).

IX. Due Process Issues

A. Hearing Office Authority

1. The parents attempted to withdraw their due process hearing complaint one week before the hearing was scheduled since her attorney felt that the assigned hearing officer could not be fair. The school district opposed the withdrawal contending that the parent should not be allowed to "forum shop" for a hearing officer more to her liking.
   The hearing officer dismissed the complaint without prejudice but stated that the dismissal would be with prejudice if she did not refile the complaint within 30 days. The parent did not refile

and three months later challenged the dismissal order with prejudice by filing a judicial appeal.
The Court upheld the hearing officer's decision. The Court noted that the IDEA does not address a hearing officer's authority to dismiss a due process complaint before the hearing. The hearing officer based her decision on a provision in the District of Columbia's (DC) "Appropriate Standard Practices" which contain procedures for the conduct of a special education due process hearing. The Court found not only was the hearing officer's dismissal consistent with DC's procedures, it was also within the hearing officer's equitable powers. Since an IDEA hearing officer oversees a quasi-judicial proceeding, the hearing officer "is vested with implied powers beyond those that are specifically enumerated". A hearing officer, subject to judicial review, "may issue decisions on procedures and craft remedies as long as they are supported by reasoning, comport with due process and achieve the goal of providing a FAPE". Silva v. District of Columbia 114 LRP 32167 (United States District Court, District of Columbia (2014)).

2. The Court granted a motion finding a charter school in contempt for not paying the student's tuition at a private school (which had accumulated to more than $176,000.00) under a previous "stay put" order issued by the Court. The school did not dispute that it has not yet paid for any of the cost of student's private school placement. The school contended that it did not have sufficient funds to pay the costs it was ordered by the Court to pay. The Court found that the school offered no proof that it could not pay the student's tuition. The Court observed that the "plaintiff has an allocation of resources problem, not an absence of resources." Flagstaff Arts and Leadership Academy v. E.S. 62 IDELR 78 (United States District Court, Arizona (2013)).

B. Stay Put

The parents of a student with a disability filed for a due process hearing seeking reimbursement of their unilateral private placement. The hearing officer concluded that the student was denied a FAPE and ordered the public school to reimburse the parents for the private school tuition. On appeal, the District Court reversed and found that the IEP for the student was appropriate.
The Court of Appeals, noting that the Circuits are divided on the issue, held that the "stay put" provision of the IDEA continues to

apply through the end of the appeals process. Here, since the hearing officer found that reimbursement was a proper remedy, the school district was obligated to continue to pay for the private placement while the District Court's contrary decision was being appealed. M.R. v. Ridley School District 744 F.3d 112 (United States Court of Appeals, 3rd Circuit (2014)). Petition to appeal to the United States Supreme Court pending.

C. Mediation/Attorney Fees

The parents prevailed in a due process hearing regarding their son and initiated a lawsuit against the school district for attorney's fees. The attorney petitioned the Court for fees incurred including the time spent to prepare for and participate in an unsuccessful mediation session held over a year after the due process hearing complaint was filed.
The school responded to the lawsuit claiming that the Court cannot award attorney's fees related to the unsuccessful mediation session since the IDEA prohibits attorney fee reimbursement for resolution meetings.
The Court held that the parents' attorney was entitled to fees for time spent in preparing for and participating in the mediation session. The Court distinguished between a mediation session held in lieu of a resolution session (which must be held within 15 days after the filing of the due process complaint) and a mediation session held over a year after the complaint was filed. In such case, the Court concluded that the mediation cannot be considered a "preliminary resolution session" and therefore the IDEA's prohibition did not apply. Board of Education of Evanston Skokie Community Consolidated School District 65 v. Risen 114 LRP 28627 (United States District Court, Northern District, Illinois (2014)).

X. Section 504 Issues

A. The parents withdrew consent for their student to receive IDEA services, but requested that the school provide him with accommodations under Section 504 of the Rehabilitation Act of 1973. The school informed the parent that it would not provide Section 504 accommodations because of the withdrawal of consent for IDEA services.
The Court held that the parent's revocation of consent for services under IDEA was tantamount to revocation of consent for services under Section 504 and the ADA. The Court based its ruling on the

United States Office for Civil Rights (OCR) letter that stated "by rejecting the services developed under the IDEA, the parent would essentially be rejecting what would be offered under Section 504". See Letter to McKethan, 25 IDELR 295 (Office for Civil Rights (1996)). The parents offered no judicial or administrative decision that called the OCR's position into doubt. Therefore, the parent could not compel the district to develop a plan under Section 504 for their student .Lamkin v. Lone Jack C-6 School District 58 IDELR 197 (United States District Court, Western District, Missouri (2012)).

B. The parents of a student with a disability revoked consent for continued IEP services under the IDEA. After the revocation was received, the school held a Section 504 meeting where it proposed a Section 504 plan that was substantively equivalent to the previously proposed IEP.

The Court held that revocation of consent under the IDEA does not impact the school's obligation under Section 504. Therefore, the school was required to convene a Section 504 meeting and develop a 504 plan after the parents revoked consent for IDEA services. Although the Court upheld the proposed Section 504 plan, it stated that the school has a "continuing obligation under Section 504 and the ADA to protect [the student] from discrimination while she remains a qualifying student with a disability, and therefore must continue to offer any accommodations or services required to ensure that [the student] is provided an opportunity for a FAPE under Section 504. " Kimble v. Douglas County School District 925 F.Supp.2d 1176, 60 IDELR 221 (United States District Court, Colorado (2013)). See also D.F. v. Leon County School Board 62 IDELR 167 (United States District Court, Northern District, Florida (2014)).

C. A school district implemented a policy banning all peanut and tree-nut products at one of its schools because a student on a Section 504 had a severe, life-threatening allergy that was aggravated by airborne exposure to nuts. The school initially attempted less-intrusive measures to alleviate any risk of harm to the student but was advised by the student treating physician that the measures were insufficient to eliminate the risk of harm.

The parent of another student in the school opposed the nut-tree policy and provided notice that she would not abide by it. The parent sued seeking injunctive relief to enjoin the school-wide ban on nut products and also requested monetary damages. She generally

contended that the adoption of the nut-free policy infringed on both her and her daughter's constitutional rights.

The Court, in upholding the ban, held that despite the parent's assertion that she was not challenging the other student's 504 plan, many of the parent's claims directly related to the school's decisions regarding the necessity and adoption of student's 504 plan. Neither the parent of the student who was non-disabled nor the student have standing to challenge the school's decisions with respect to the other student's Section 504 plan. The Court also held that the parent had not shown that the school's implementation of the school-wide ban was arbitrary and therefore irrational. The Court found that the trial court did not err by ruling that neither the Equal Protection Clause nor the Due Process Clause of the Constitution provided a basis for legal relief. Liebau v. Romeo Community Schools 61 IDELR 231 (Michigan Court of Appeals (2013)).

D. OCR conducted a compliance review of a virtual charter school. The compliance review assessed whether the school discriminated against students with disabilities by failing to ensure they receive a free appropriate public education (FAPE) under Section 504. This included assessing whether the school identified, evaluated, placed, and provided procedural safeguards for students with disabilities in conformance with Section 504 and Title II of the Americans With Disabilities Act.

OCR determined that the school had not established policies and procedures or practices under Section 504 to ensure that it provides a FAPE. The investigation revealed that the school did not comply with the evaluation and placement requirements since the school does not conduct appropriate evaluations before placing students with disabilities on Section 504 plans. The school referred parents to outside providers who could perform testing or other evaluations, including medical assessments if needed, but it did not cover the cost of those evaluations as required if a Section 504 team determines that such information is necessary. In addition, the school did not draw upon a variety of sources but rather relied on information provided by parents and guardians and, as available, former schools and teachers. The school also did not examine the Section 504 plans of new students to determine whether they are appropriate before adopting and implementing the plans, even though many plans did not have previously provided for placement of the student in an on-line educational environment.

OCR's investigation also revealed that the school failed to comply with Section 504's regulation that requires that placement decisions

be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Rather, the Section 504 Coordinator would decide that a student has a disability and determine what services were required for the student based solely on a discussion with the student's parents/guardians.
OCR determined that the school's website and online learning environment did not comply with the Accessibility Standards and were not accessible to individuals with disabilities, including visual impairments, to provide them with an equal opportunity to participate in or benefit from its web-based education program. Last, OCR found that the school had not provided training to the Section 504 Coordinator to ensure that she had sufficient knowledge of the legal requirements of Section 504 and Title II to effectively carry out her responsibilities. Virtual Community School of Ohio 62 IDELR 124 (United States Department of Education, Office for Civil Rights (2013)

E. The parents of a student with Type 1 diabetes sued their former school district alleging discrimination on the basis of disability based on Section 504. The student's 504 plan incorporated the student's Doctor's order and required that three staff members be trained by the school to administer insulin to the student and to monitor and respond to alarms from his glucose monitor.
The school hired a licensed nurse to perform the necessary diabetes care for the student. The nurse resigned after a personnel dispute with her supervisor and another nurse was assigned to provide the student with care.
Due to a mix-up regarding new orders from the Doctor, the school did not follow the new order. The parents were unhappy with the school's refusal to adjust the insulin dosage at their request. The parents removed their student from public school and filed a lawsuit based on Section 504 discrimination alleging the services in the 504 plan were not fully implemented.
The Court held that there was no violation of Section 504. The Court stated "for 504 plan violations to constitute disability discrimination, they must be significant enough to effectively deny a disabled child the benefit of a public education". Even though three staff members were not trained as the 504 plan required, a nurse provided the services to the student with the exception of one day which the Court termed a "minor violation". In addition, since the Doctor did not provide clear orders, the school did not act unreasonably in refusing to alter the recommended doses of insulin as the parent had requested. C.T.L. v. Ashland School District 743 F.3d 524, 62

IDELR 252 (United States Court of Appeals, 7th Circuit (2014)).

XI. Miscellaneous Issues

A. The United States Department of Education issued a Question and Answer document regarding IDEA Dispute Resolution procedures including State Administrative Complaints.
In resolving a State complaint challenging a public agency's eligibility determination, an SEA should determine not only whether the public agency has followed the required Part B procedures to reach its determination, but also whether the public agency has reached a determination consistent with Part B requirements. The SEA may find that the public agency has complied with Part B requirements if the public agency has followed required procedures, applied required standards, and reached a determination that is reasonably supported by the child-specific data and is consistent with Part B. If the SEA determines that the public agency's eligibility determination is not supported by the child-specific facts, the SEA can order the public agency, on a case-by-case basis, to reconsider the eligibility determination in light of those facts. Question B-6

On issues regarding whether a FAPE has been provided, the SEA may find that the public agency has complied with Part B requirements if the evidence clearly demonstrates that the agency has followed required procedures, applied required standards, and reached a determination that is reasonably supported by the child-specific data. 71 FR 46601 (August 14, 2006). If the SEA finds a violation of FAPE for the child, it must address the violation. This includes, as appropriate, ordering an IEP Team to reconvene to develop a program that ensures the provision of FAPE for that child or ordering compensatory services. Question B-8

Pursuant to its general supervisory authority, the SEA has broad flexibility to determine appropriate remedies to address the denial of appropriate services to an individual child or group of children. Question B-10. Questions and Answers On IDEA Part B Dispute Resolution Procedures, Question 24 (United States Department of Education, Office of Special Education and Rehabilitative Services (July 2013))

B. OSEP has issued a policy interpretation that a state may permit the use of email to distribute IEPs and related documents, such as progress reports, to parents, provided that the parents and the school

district agree to use the electronic mail option, and the States take the necessary steps to ensure that there are appropriate safeguards to protect the integrity of the process.
In addition, states may use electronic or digital signatures for consent, provided they take the necessary steps to ensure that there are appropriate safeguards to protect the integrity of the process. That is, a parent must understand and agree to the carrying out of the activity for which the parent's consent is sought. Letter to Breton 114 LRP 14938 (United States Department of Education, Office of Special Education Programs (2014))

C. The Court of Appeals held that the Americans with Disabilities Act (ADA), Title II (which applies to public accommodations) did not require a school district to structurally alter public seating at a high school football field, where the seating was constructed in 1971 prior to the ADA's enactment.
In contrast to newly constructed or altered facilities, a public entity's existing facilities—those facilities constructed prior to January 26, 1992— need not be "accessible to and usable by individuals with disabilities." (see ADA regulation, 28 C.F.R. Section 35.150(a)(1)). Rather, with respect to existing facilities, a public entity need only provide program access, by "operat[ing] each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."
Here, the school district did provide program access to individuals who use wheelchairs. The school district did designate three specific locations from which persons who use wheelchairs are able to watch football games. The school district also permits spectators who use wheelchairs to sit on the north and south sides of the field, on the paved area, at any point along the fence. Daubert v. Lindsay Unified School District (United States Court of Appeals, 9th Circuit (2014)).

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.